



**Republic v Makau & another (Criminal Case 32 of 2016)  
[2024] KEHC 3700 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 32 OF 2016  
DAS MAJANJA, J  
APRIL 9, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ERICK MUSILA MAKAU ..... 1<sup>ST</sup> ACCUSED**

**DIANA CHEMUTAI RONO ALIAS CHELELE ASHA (DECEASED) .... 2<sup>ND</sup>  
ACCUSED**

**JUDGMENT**

1. The accused, Erick Musila Makau And Diana Chemutai Rono Alias Chelele Asha were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Chapter 63 of the Laws of Kenya). It is alleged that on the night of 30<sup>th</sup> and 31<sup>st</sup> March 2012 at an unknown time at Ruseya area of Konoin District within Bomet County, jointly with others not before court they murdered Eliud Kipchirchir Yego (“the deceased”).
2. The 1<sup>st</sup> accused (“the accused”) was charged jointly with his wife, the 2<sup>nd</sup> accused (“Diana”), but the charges against her were terminated following her death. This matter was then transferred from the High Court in Kericho, to the Criminal Division at the High Court in Nairobi before it was eventually transferred to the High Court in Kisumu following an application by the accused’s counsel, on the grounds of his and the accused safety. I took over conduct of the matter and proceeded with after complying with section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya). The prosecution marshalled 11 witnesses to support its case and while the accused gave sworn testimony and called one witness in his defence.
3. The prosecution evidence was as follows. Samuel Kibet Rotich (PW 1), a watchman at CIS Mara Guest House in Bomet, testified that he was on duty on 30<sup>th</sup> March 2012. As he was walking around the compound at about 6.00pm, he noticed a black saloon car parked outside. He went in and met Diana



who was a regular customer and whom he knew as a musician. She told him that she had booked Room 6 for a male guest. She requested him to serve her guest water which he did. She also alerted him that the guest was being followed by the police. PW 1 recalled that he found Diana's guest lying on the bed and did not see him well. At about 11.00pm, two men, one dressed in civilian clothes and the other dressed in army uniform, arrived at the Guest House and asked to go to Room 6 but he declined to let them in. When three of his colleagues came, the two men identified themselves as police officers by showing their staff identification cards. PW 1 and his colleagues escorted the two to Room 6 but were told to go back. As they went down the stairs, they heard a commotion in the room. Shortly thereafter, PW 1 saw Diana and the two police officers lead Diana's guest, who was in handcuffs, into the black saloon car. When cross examined, PW 1 admitted that he did not see Diana's guest well and did not take the details of the two men who identified themselves as police officers.

4. On 31<sup>st</sup> March 2012 at about 7.00am, Chief Inspector Musembi Gongu (PW 7) received a call from the area chief that a body had been found along Mogogosiek Road near Ruseya River on the border of Kericho and Bomet County. PW 7 and his colleague visited the scene where they found a partly burnt body of a male person lying on his back with his hands handcuffed at the back about 3 meters off the road. PW 7 searched the scene and recovered two spent 9mm cartridges on the ground close to the body. They also searched the body and recovered the deceased's identity card in a wallet together with other documents. They cut off the handcuffs and took the body to the mortuary. PW 7 handed over the 2 spent cartridges, the identity card and the broken handcuffs to the DCIO for further investigations.
5. The investigating officer, Inspector Judah Muthee Festus (PW 10) informed of the incident on the morning of 31<sup>st</sup> March 2012. When he arrived at the scene in the company of Scenes of Crime Personnel, the body had already been taken to the mortuary. The officers took soil samples and recovered a white jerrican with some liquid. PW 10 testified that PW 7 handed over a wallet which contained an identity card, the two spent cartridge and a pair of black shoes. He found a number on a business card. He called the number which was that of the deceased's wife and inform her of the death. She inquired about his motor vehicle KBK 363S, Toyota NZE and he informed her that they were following up on the same. He testified that the deceased's brother, Jacob Yego (PW 2) arrived at Litein on that day and they proceeded to Kapkatet District Mortuary where he identified the deceased's body. PW 2 testified that the body was taken to Moi Teaching and Referral Hospital ("MTRH"), Eldoret, where he witnessed the post-mortem.
6. Dr. Wekesa Nalinya (PW5) conducted the post mortem on the deceased body on 2<sup>nd</sup> April 2012 at MTRH. The doctor observed a gunshot entry wound on the right side of the skull about 5cm in diameter and an exit gunshot wound on the left side of the skull measuring 2 X 1cm. The deceased's body and clothes were badly burnt. The deceased had deep burns which had exposed muscles on the back and which involved most of the body including the whole trunk and both upper and lower limbs. PW 5 also observed multiple abrasions and bruises on the posterior wrists of both hands. Internal examination revealed a fracture of the skull from the left to the right side with bleeding and a laceration of the brain involving the parietal lobes. PW5 concluded that the cause of death was severe head injury due to gunshot wounds. From his findings, the deceased was dead by the time he was burnt. He produced the post-mortem report he had prepared as an exhibit.
7. Dennis Owino (PW 4), an analyst working with the Government Chemist produced a report dated 30<sup>th</sup> July 2012 prepared by the retired head of his department, Habil Akech Omondi. Mr. Aketch had received a police exhibit memorandum accompanying a five litre white jerrican containing some liquid (Item A), a polythene bag containing soil (Item B) and a khaki envelope containing a partly burnt wallet with partly burnt items (Item C). Having conducted the analysis, the analyst found that the



liquid in the jerrican was kerosene which was detected on the partly burnt wallet. He did not make any findings regarding the soil in the bag.

8. A firearms examiner working with the Directorate of Criminal Investigation, Johnstone Mwongela (PW 6) testified that he received the two fired cartridge cases which he marked as Exhibit A1 and A2. The spent cartridges were accompanied with an exhibit memorandum form requesting him to examine the two cartridge cases, examine their calibre and determine the firearm from which they had been fired. He later received additional exhibits including one pistol Serial No. F9190 marked as Exhibit A, one magazine marked as Exhibit B and 12 rounds of ammunition marked as exhibits C1 to C12. He was instructed to examine the pistol and determine whether it was the one that had been used to fire the two cartridge cases from the crime scene; Exhibits A1 and A2.
9. After conducting his analysis, PW6 found that the pistol was a C2-85B Ceska pistol of calibre 9mm designed to fire 9 x 19mm ammunition such as exhibits C1 to C12. He found that the pistol was in good mechanical condition and it was complete in all its component parts and was capable of firing ammunition. He test fired 5 rounds of ammunition which he picked at random from exhibits C1 to C12 using the Ceska Pistol and obtained 5 test cartridges and 4 test bullets which he retained for microscopic examination. He produced the pistol as Exhibit No. 7 A, the magazine as Exhibit No. 7B, 7 live rounds of ammunition which were part of Exhibit C1 to C12 as Exhibit No. 8 A-G, the two cartridge cases which had earlier been marked as A1 and A2 as Exhibits 9A and 9B, the test cartridges as Exhibits No. 10 A-E and the joint test bullets as Exhibit No. 11- A, B, C and D.
10. Having carried out the tests, PW6 formed the opinion that the pistol was a firearm and the ammunition was ammunition as defined under the *Firearms Act* (Chapter 114 of the Laws of Kenya). He found that the two fired cartridge cases, Exhibits 9A and 9B were 9x19 mm calibre and following an examination under a comparison microscope, he found that the two had been fired from one gun. He compared Exhibits 9A and 9B to the test cartridges Exhibit No. 10 A-E and found sufficient matching bridge face marking and sufficient matching firing pin markings which led to his conclusion that Exhibits 9A and 9B had been fired from the Ceska Pistol Serial No. F9190. He produced the Exhibit Memos as Exhibit 12 A and 12 B, his report dated 20<sup>th</sup> April, 2012 as Exhibit 12C and photomicrographs of his examination of the cartridges as Exhibits 13 A-X.
11. Simon Lagat (PW 8) testified that he was from the Nairobi Security of Government Buildings (“SGB”) and VIP Protection Unit and was in charge of the armoury at the material time. He recalled that on 10<sup>th</sup> January 2012, the accused was allocated one pistol, a Ceska Serial No. F9190 with one magazine and 12 bullets. The bullets were 9mm calibre. He testified that the accused was working with the Administration Police Service in the VIP Protection Unit and as part of his duties he had been assigned to the then Permanent Secretary, Ministry of Transport, Eng. Cyrus Njiru as a body guard. PW 8 told the court that according to the Firearms Movement Register, the accused had been issued a Ceska Pistol and one magazine with 12 bullets on 10<sup>th</sup> January 2012 at 2:40pm. The accused signed for the firearm personally. The accused was to retain the firearm for 3 months. In this case, PW 8 stated that the accused did not return his gun. PW 8 further testified that the Ceska Pistol serial No. F9190 and magazine produced in evidence were the ones issued to the accused.
12. The arresting officer, David Cheruiyot (PW9) narrated how he was instructed by the in charge, Flying Squad to assist PW 10 in tracing and arresting the accused. On the night 19<sup>th</sup> and 20<sup>th</sup> April, 2012, he proceeded to the accused residence in Shauri Moyo SGB camp where he arrested the accused and recovered from him his official pistol a Ceska Serial No. KEAPF9190. It had 12 rounds of ammunition. They also took possession of a Samsung mobile phone B7722 serial No. 359253045440833. The accused was taken to the flying squad Headquarters along Kipande Road.



13. Later that same night, they travelled to the accused home in Kibwezi where they found the deceased's motor vehicle registration Number KBK 363S NZE Toyota parked in the accused compound, covered under a tent with 4 missing tyres. While there, PW 9 learnt that the ignition key and the missing tyres were in the possession of the accused brother Dennis Mwangela Makau (DW 2). DW 2 was apprehended and brought to the scene. They recovered two mobile phones from DW 2, a Techno mobile phone serial number 352475032706143 and Nokia 1200 serial number 356858/2/258090/7. The deceased's phone was not recovered. DW 2 informed them that the tyres were in the custody of Diana. They recovered the missing tyres from an Autospares shop in Madaraka Estate.
14. Corporal Joseph Nepukoli (PW3) who was attached to Directorate of Criminal Investigations – Scenes of Crime took photographs of the accused homestead, the vehicle registration number KBK 363 S and the motor vehicle's tyres. He produced the photos and certificates of production as exhibits.
15. Daniel Hamisi (PW11) testified that he was working with Law Enforcement Liaison Office of Safaricom at the Headquarters. He presented a report and a certificate which had been extracted by Weldon Siongok in reference to the matter. The DCI office at Litein had written requesting assistance in the investigation of Safaricom accounts 0722726195, 0715266140 and 0710919131 and to provide subscription details and links of communication between the holders of the accounts from 29<sup>th</sup> March, 2012 to 1<sup>st</sup> April, 2012.
16. Part A of the first report indicated that the accused was the subscriber of account 0715266140. Part 2 contained the IMEI list which showed the list of mobile phones paired to the account at the time under investigation. They identified only one handset paired to the number which was IMEI – 359253045440830. Part 3 of the account provided information regarding the incoming and outgoing calls between 15<sup>th</sup> March 2012 and 5<sup>th</sup> April, 2012. PW11 explained that the 1<sup>st</sup> column and 2<sup>nd</sup> column of the report showed the registered numbers, whether incoming or outgoing and the 3<sup>rd</sup> column showed the date and time. The last column of the account indicated the location and gave a code related to where a particular call was made.
17. PW 11 also produced a report in respect of 0710919131 which was registered in the name of Diana. Two handsets were captured by the account being IMEI 861071000432310 on 31<sup>st</sup> January 2012 and 356980019789620 from 13<sup>th</sup> February 2012. Part 3 contained information regarding calls made between 15<sup>th</sup> March 2012 and 5<sup>th</sup> April, 2012. PW 11 then produced a report in respect of the deceased's account number 0722726195. 3 handsets were captured between 29<sup>th</sup> September 2008 and 16<sup>th</sup> September 2009. At the material time, the deceased was using the last handset. He produced copies of all three reports which had been certified by Weldon Siangok. PW 11 also produced a report showing the codes and the respective names of the sites referred to in the three reports.
18. PW 10 proceeded to testify that based on the data he had received from Safaricom he found out that the deceased's number 0722726195 had received a call from number 0715266140 which belonged to the accused. The deceased's phone number had called the accused persons number at 2349 hrs on 30<sup>th</sup> March 2012. The data showed that the deceased and the accused communicated while at Mogogosiek where the deceased's body was discovered the next day. After the accused and Diana were arrested, PW 10 confiscated two mobile phones from her. He received information that Diana had booked a room at CIS Mara Guest House in Bomet Town on 30<sup>th</sup> March 2012 in the company of the deceased. The accused and another person proceeded to CIS Mara Guest House where they purported to arrest the deceased but they did not take him to Bomet Police Station. PW 10 was informed that the deceased's vehicle had been recovered in Nandi without tyres and the tyres recovered from a shop where Diana sold them. PW 10 also obtained a copy of the logbook and search for the vehicle registration number KBK 363 S which confirmed that the deceased owned the vehicle.



19. In his sworn defence, the accused admitted that he was an administration police officer stationed at Langata SGB attached to the VIP protection unit where he had been assigned to guard Eng. Cyrus Njiru, 6 months prior to his arrest. He testified that his schedule with the PS was strict and that he was never given an off day during the weekday and that the PS would not go anywhere without him. He stated that he would leave his residence at 4:30am, go to pick the PS from his home and would be with him the whole day and head for home at about 10:00pm. The accused testified that on 30<sup>th</sup> and 31<sup>st</sup> March 2012 and the whole month preceding his arrest, the PS was involved in meetings in Nairobi and did not take any trips to Bomet or the Rift Valley.
20. The accused recounted how he was arrested on 20<sup>th</sup> April 2012 at about 11.00pm at his home. Several officers went to his home that night; asked for his gun and counted 12 bullets. He was taken to the Flying Squad Headquarters where he was informed that the deceased who was a friend of his wife had been killed in Bomet and that Diana, his wife, was under arrest. When they arrived at his home in Kibwezi, the accused stated that they found a vehicle without tyres covered with tarpaulin. He explained that he had left his Kibwezi home to his brother and moved to Makindu. He was informed that the vehicle belonged to the deceased. He stated that Diana was a musician and would hire a vehicle and go to perform in different places and his brother would accompany her. He testified that she had a contract with an international organisation to perform in Voi and the car she had hired broke down and was parked in Kibwezi. He told the court that he lived in a two bed-roomed house and kept his gun in an inbuilt safe. He stated that only Diana had access to it and she often travelled to shows. He stated that he was shocked by the allegations and testified that he was not present when his firearm was taken for testing and did not assign anyone to attend on his behalf. He insisted that due to his discipline, he had been nominated to join the VIP Protection Unit. He went on to state that on the material day, he was not in Bomet and had never travelled to Bomet in March 2012.
21. In cross-examination, the accused admitted that his phone number was 0715266140. He also stated that his gun was neither lost nor misplaced at the time material to the case. He also testified that he had no disciplinary issue or any problem with any officers.
22. The accused's brother and only witness, DW 2, testified that at the material time he was residing in Mtito Andei in Kibwezi. He stated that on 18<sup>th</sup> April 2012, Diana called and told him that she had a show in Mombasa and the car they were using had a mechanical problem. She asked him to take the vehicle's tyres. He was later on arrested and questioned about the vehicle.
23. At the close of the trial, only counsel for the accused filed written submissions. I will consider the issues raised therein in my determination whether the prosecution proved its case beyond reasonable doubt.
24. The offence of murder is defined by section 203 of the Penal Code as follows, "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." The prosecution is required to prove the following three ingredients beyond reasonable doubt; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to that death; and that the accused committed the unlawful act or omission with malice aforethought.
25. The fact and cause of the death of the deceased was clearly established. PW 7 found the deceased's partly burnt body lying along the roadside. The deceased's brother, PW 2, identified the deceased. PW 5, who conducted the post-mortem, concluded that the cause of death was severe head injury due to a gunshot wound. He ruled out the burns as the cause of death as he had not observed any inhalation injuries. I therefore find and hold that the deceased died and he died from the gunshot wound inflicted on his head.



26. The contentious issue in this case is whether the accused fired the shot that killed the deceased. None of the prosecution witnesses saw the accused kill the deceased and as such, the case against him was based on circumstantial evidence. Counsel for the accused submitted that the prosecution had not discharged its burden of proof and thus failed to dispel his alibi. He drew the court's attention to the fact that the prosecution had failed to call any eye witnesses and submitted that the circumstantial evidence adduced could not link him to the commission of the crime in accordance with principles set out by the Court of Appeal in *Sawe v Republic* [2003] KLR 364 and *Abanga Alias Onyango versus Republic* CA CR. A. No. 32 of 1990 (UR).
27. In *Abanga Alias Onyango versus Republic* CA CR. A. No. 32 of 1990 (UR) the Court of appeal set out the factors to be considered when evaluating circumstantial evidence as follows:
- i. The circumstance, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
  - ii. Those circumstances should be of definite tendency and unerringly pointing towards the guilt of the accused.
  - iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.
28. In order to establish the culpability of the accused, the prosecution relied on the several strands of circumstantial evidence as follows. First, the evidence of PW 1 placing Diana at the CIS Mara Guest House where she had a guest and the where the two people who identified themselves as police officers arrived and took away the guest. Second, the fact that the deceased's body was found alongside Mogogosiek Road and two spent 9 mm cartridges recovered at the scene. Third, the fact the deceased died of a gunshot wound to the head. Fourth, the analysis of the firearms expert of the accused's firearm, the bullets and spent cartridges which pointed to the accused who had been issued with the firearm. Fifth, the evidence of mobile cell phone data that connected the accused, Diana and the deceased to the locus in quo. Sixth, the recovery of the deceased motor vehicle registration No. KBK 363S at the accused's home in Kibwezi.
29. The key evidence connecting the accused to the deceased is that of the firearm. The fact that the firearm had been allocated to the accused was proved by PW 8. He produced the Arms Register and confirmed that the accused had been allocated the Ceska Pistol Serial No. F9190 on 10<sup>th</sup> January 2012 and had not returned it to the armoury by the time the deceased was killed. The same pistol was retrieved from the accused by PW 9 on the night of 19<sup>th</sup> and 20<sup>th</sup> April 2012. Indeed, the accused, in his defence, admitted that he had been issued with a firearm and he was in possession of it at the time of the incident and at the time he was arrested.
30. Counsel for the accused contended that PW 9 had not made a proper inventory of the items he recovered from the accused which included the pistol, a jacket and mobile phone. PW 9 conceded in cross examination that he did not seal the pistol in a bag or take an inventory of it. He also pointed out that PW 7 had failed to take inventory of the two spent cartridges he retrieved from the crime scene. The accused argued that the entire procedure of acquiring the cartridges and making the report had been full of lapses. In his view, the possibility that the firing pin had been changed had not been eliminated. He also pointed out that the cartridges had not been photographed or dusted for fingerprints. He relied on the decision of the Supreme Court of South Africa in *South Africa Bamba v S* (20089/14) 2014 ZASCA 219 (11<sup>th</sup> December 2014) and *Republic v Peter Nguli* Criminal Case No. 5 of 2010 [2010]



eKLR in support of his submission that the police had a duty to recover, store, record and convey ballistic exhibits to avoid material discrepancies, which he claimed, they had failed to do in this case.

31. I hold that failure to take inventories by the police officers was not proof that there had been foul play or negligence on the part of the police as suggested by the accused. I adopt the position taken by the court in *Stephen Kimani Robe and 2 Others v Republic NRB HCCRA No. 236 of 2012 [2013] eKLR*, where the court observed that, “The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.” In *Leonard Odhiambo Ouma and Another v Republic NKU CA Criminal Appeal No. 176 of 2009 [2011]eKLR*, the Court of Appeal held the failure to prepare an inventory was not fatal to the prosecution case. It expressed the view that:

Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial. We find no substance in this ground as well. We further think that the contention in ground 6 that the case was not properly investigated and therefore the evidence ought not to have been relied on by the trial court, we think this relates to an issue of credibility of the witnesses and therefore was a matter for the trial court and in the circumstances, we cannot as the final appellate court entertain the challenge as we cannot fault the trial court on credibility. For this reason the ground cannot be sustained and the same is rejected.

32. The prosecution showed the clear sequence of how the exhibits were collected and handed over for testing. PW 7, who collected the spent cartridges and other items found at the scene and handed over the matter to PW 10 for further investigation. There was no suggestion either directly in the defence or in cross-examination, that PW 7 and PW 10 were motivated by animus against the accused.
33. An analysis by the firearms examiner, PW 6, of the two spent cartridges found at the scene by PW 7, revealed that they had been fired from a Ceska Pistol Serial No. F9190, which had been recovered from the accused by PW 9. He compared the two spent cartridges and found that they were fired from the same gun. He then compared the two spent cartridges with the test cartridges he had fired from the pistol and found sufficient matching bridge face marking and matching firing pin markings which led him to the conclusion that the two spent cartridges had been fired from the Ceska Pistol Serial No. F9190. He testified that a firearm’s firing pin transfers its unique marking to the cartridge casing and the firearms bridge face was imparted on the cartridge as the bullet was fired through the barrel. He admitted that a firing pin could be changed and the use of a firearm could also affect the pin but was adamant that the bridge face markings could not be altered and were more valuable in such an examination.
34. PW 10 sent the spent cartridges for ballistic testing which were received by PW 6 on 4<sup>th</sup> April, 2012. There is no evidence on record that the spent cartridges were tampered while in the possession of PW 10 or PW 6. As for the pistol, PW 9 testified that he retrieved it from the accused on the night of 19<sup>th</sup> and 20<sup>th</sup> April, 2012. He testified that he handed over the pistol to PW 10, who in turn handed it to PW 6 for testing. PW 6 received the pistol which he promptly subjected to ballistic examination. He prepared his report on the same day he received the pistol and concluded that the pistol had been used to fire the two spent cartridges. PW 8 had testified that he had issued the pistol to the accused who did not return it to the armoury within the stipulated time.



35. Based on the foregoing, I find and hold that the accused was the holder of the Ceska Pistol Serial No. F9190. That the pistol was in working order and was in possession of the accused when the deceased was killed and the two bullets found next to the deceased were fired by the accused's firearm.
36. The other evidence that connects the accused to the death of the deceased are the phone records. The phone records produced by PW 11 also showed that accused was at Mogogosiek where the deceased body was found dead. The data from Safaricom showed that the deceased phone number 0722726195 and the accused through his phone number 0715266140 communicated at 2349 hrs on 30<sup>th</sup> March 2012 at Mogogosiek area. PW 9, who had confiscated the accused mobile phone testified that the serial number of his phone was IMEI – 359253045440830. This was the only handset PW 11 found paired to the accused mobile phone number at the material time. Moreover, the accused had confirmed that his mobile phone number was 0715266140, which tallied with the prosecution's case.
37. The accused also submitted that the bases from where the calls were made could have been changed as the exhibits did not show the date or time of the cell site information relied on by the prosecution. He relied on a report prepared by Foresight Expert Witness Services which states that cell site analysis can be used to identify the geographical location from which a call is made. The report goes on to say that cell site analysis can approximate whether the accused was in the vicinity of the crime scene as calls are transferred to different cells to avoid interruption so the distance between the cells can indicate whether the suspect was travelling. Counsel for the accused further urged that the cell phone data was inadmissible. He referred this court to the decision of the Supreme Court of the United States in *Carpenter v United States* No. 16-402, 585 U.S. [2018] where the majority decision held that the police would need a warrant to obtain cell-site location records for persons under investigation.
38. The expert report relied upon by the accused was submitted as part of the written submission. This report was not adduced as part of the defence case. It was not put to the prosecution witnesses and the prosecution did not have the opportunity to test it through cross-examination of the expert who prepared it. In short, it is not admissible as evidence and I must disregard it.
39. That said, counsel for the accused did not object to the testimony and documentary evidence produced by PW 11 on the ground that it was obtained in violation of Article 31(d) of *the Constitution* which protects the right to privacy. In addition, counsel for the accused submitted that the police should have applied for and obtained a warrant to access his phone records. While I accept that section 29 (a) of the Criminal Procedure Code (Chapter 75 of Laws of Kenya) and section 57 of the *National Police Service Act* empowers a police officer to search premises, stop vehicles, etc without a warrant if a police officer has reasonable cause to believe "that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation," this issue was not raised during the trial as a basis of objection to the evidence. The evidence of PW 11 and the documents he produced were admitted and subjected to cross-examination. For the accused to raise the issue at the point of submissions, is it to deny the prosecution the opportunity to put forward its case or justification for the warrant. I therefore reject this submission.
40. The records produced by PW 11 clearly showed that the accused travelled to the locus in quo on the night of 30<sup>th</sup> March 2012. PW 11 produced a report which contained codes of the Base Transmission Stations and the respective names of the areas from where the calls originated. This report, which was certified by Safaricom, confirmed the sites at the time relevant to the accounts of the accused and deceased.
41. Then there is the evidence of PW 9 that the deceased's motor vehicle registration number KBK 363S, Toyota NZE which had been seen on that fateful night was found at the accused's home in Kibwezi.



He went to the accused home in the company of PW 3 who took photos of the vehicle and also took photos of the tyres when they were recovered from Nairobi West by PW 10. PW 9 testified that the accused brother, DW 2, had the ignition key of the deceased's vehicle in his possession. PW 10 produced a copy of the logbook and search for the vehicle registration number KBK 363S which confirmed that it belonged to the deceased.

42. As against the evidence, I have outlined, the accused raised an alibi defence. His evidence was that given the nature of his work with the PS and lack of opportunity to travel to the Rift Valley and more particularly Bomet he could not have committed the felonious act. In *Saidi s/o Mwaka Wanga v Republic* [1963] EA6, the East Africa Court of Appeal held as follows

An accused person putting forward an alibi as an answer to a charge made against him does not in law thereby assume any burden of proving that answer and if the accused adducing evidence of an alibi introduces into the mind of the court a doubt that is not unreasonable then the court must acquit him.”

43. The accused's defence suggests that his wife, Diana, could have killed the deceased as she was the only one with access to his firearm and often travelled to perform in various places accompanied by his brother, DW 2. The accused had been informed that Diana had hired the deceased vehicle and that it broke down and had to be parked at his home in Kibwezi. He however admitted in cross-examination that he had never lost his phone thus his defence did not explain why his phone was at the scene of the crime on the night the deceased was killed even if Diana is the one who could have had his firearm.
44. When examined alongside the prosecution's case, I find this defence wanting. The evidence of his mobile phone established that he was locus in quo with the deceased. The deceased had communicated with the accused on phone shortly before he was shot and killed using the accused pistol. The deceased's vehicle was then retrieved from the accused person's home in Kibwezi. In cross-examination, the accused admitted that he had no disciplinary issue or any problem with any officer which showed that the prosecution witnesses had no reason to falsely implicate for the crime. The facts presented all pointed to the accused guilt.
45. Counsel for the accused contended that failure by the prosecution to call the workers at CIS Mara Guest House was fatal to the prosecution's case. Section 143 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.” The prosecution reserves the right to decide which witnesses it should call to establish its case beyond reasonable doubt. In *Keter v Republic* [2007]1 EA 135 the court held that, “The prosecution is not obliged to call superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”
46. I agree that it would have been useful for the prosecution to call additional witness to verify that the accused was one of the people who were at the Guest House. In fact, the testimony of PW 1 did not place the accused at the Guest House and this would have been a proper case to conduct an identification parade. However, this does not undermine the prosecution case which I have shown already puts the accused at the locus in quo and the gun that killed the deceased in his hands.
47. I would also point out that a gun and firearm is a very personal item and I am sure that the accused, as a disciplined officer in the VIP Protection Unit would take great care to secure it. The prosecution established that the accused was in possession of the Ceska Pistol Serial No. F9190, a fact the accused admitted. The testimony of PW 6 pointed to the fact that the bullets recovered beside the deceased's body after he had been shot where from the accused's pistol. The possession and use of a personal firearm is a personal matter within the knowledge of the accused hence the natural and direct



implication, is that the accused is the killed the deceased. In these circumstances, the accused had to explain what happened to firearm in accordance with section 111(1) of the Evidence Act which provides as follows:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. [Emphasis mine]

48. In the absence of a reasonable explanation and an account of the firearm and in light of all the evidence I have outlined, I find and hold that the accused was the person who shot the deceased and caused his death. I have also come to the conclusion that all the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that the felonious act was committed by the accused and no one else.
49. Turning to the last ingredient of malice aforethought, a court is entitled to consider the surrounding circumstances including factors such as the part of the body that was targeted, the type of weapon used and the type of injuries inflicted upon the deceased (see *Rex v Tubere s/o Ochen* [1945] 12 EACA 63). The accused shot the deceased on the head with his pistol. Being a police officer he is expected to know that his actions would inevitably lead to grievous harm or death of the deceased. The fact of malice aforethought is further buttressed by the fact after killing the deceased, an attempt was made to dispose of the body by burning it with kerosene.
50. Before I conclude this judgment, I must state that the accused's motive was not clear from the evidence. The prosecutor's cross examination of the accused suggested that the death of the deceased was as a result of a love triangle between him, Diana and the deceased. In *Choge v Republic* [1985] KLR 1, the Court of Appeal dealt with the issue of motive as follows:

Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.

51. It has also been held that, "Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime." (See *Dishon Litwaka Limbambula v Republic* KSM CA Criminal Appeal No 140 of 2003 [2003] eKLR.) In this case the prosecution did not establish a clear motive that caused the accused to kill the deceased. However, in light of



the evidence, I find that not only did the accused kill the deceased but he killed him with malice aforethought.

52. I therefore find Erick Musila Makau guilty of the murder of ELIUD KIPCHIRCHIR YEGO contrary to section 203 of the Penal Code and I convict him accordingly.

**SIGNED AT KISII**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF APRIL 2019.**

**T. W. CHERERE**

**JUDGE**

